

STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Jemar Bennett,
Fire Fighter (M1866W), City of
Plainfield

List Removal Appeal

CSC Docket No. 2021-1122

ISSUED: JULY 2, 2021 (EG)

Jemar Bennett, represented by Robert K. Chewning, Esq., appeals the removal of his name from the Fire Fighter (M1866W), City of Plainfield eligible list due to an unsatisfactory background report.

The subject eligible list was promulgated on March 29, 2019, and expires on March 28, 2022. In disposing of the February 25, 2020 certification, the appointing authority initially requested that the appellant’s name be removed from the subject eligible list for failing his psychological examination. The appointing authority later amended the certification indicating that the appellant was removed due to an unsatisfactory background report.¹ Specifically, it asserted that the appellant was arrested on August 20, 2012, for possession of a controlled dangerous substance (CDS) and marijuana. Additionally, the appellant was arrested on January 23, 2019, and charged with obstruction of the administration of law. It is noted that the appointing authority did not indicate the disposition of either arrest.

On appeal, the appellant argues that his arrests do not adversely relate to the position of Fire Fighter and that he should not have been removed from the subject eligible list. Additionally, he contends that he disputed the reported facts concerning his January 2019 arrest, specifically that he was screaming at officers while other individuals were being arrested. He asserts that he was calmly trying to explain the situation to officers when an officer ordered that he be put in handcuffs. The appellant asserts the court did not convict him of obstruction of the administration of law, rather he entered into a plea deal and paid a fine. With regard to his 2012 arrest, the appellant argues that it occurred when he was 19 years old and it was an isolated incident. He states that he complied with all court requirements including completing a pre-trial intervention program. Further, the appellant contends that he

¹ It is noted that the appellant passed his psychological examination.

was given a conditional offer of employment when he was sent to a psychological examination and that he passed the examination. He also relies on *In the Matter of Michael Acosta, Police Officer (S9999A), West New York* (MSB, decided June 9, 2004) in asserting that the appointing authority has not shown good cause to remove his name after having offered a conditional offer of employment. Finally, the appellant questions the true reason the appointing authority removed him from the eligible list and he requests a hearing on this matter.

In response, the appointing authority, represented by Denise Errico Esmerado, Esq., reiterates the appellant's arrest history and contends that he is not a suitable candidate for Fire Fighter. It argues that the January 2019 incident occurred just three months before the subject list promulgated. In addition, it states that the police report of this incident indicates that the appellant twice ignored a police directive to stay back, to allow the police to control the scene of an arrest. It asserts that the appellant got loud, screamed in an officer's face and that his behavior incited a crowd and created additional tension. The appointing authority also argues that the appellant's indication in his application that he was calmly talking to officers at best demonstrates his poor reporting skills and at worst demonstrates his untruthfulness. It asserts that the appellant's behavior cannot be reconciled with that of Fire Fighters, who are routinely tasked with working closely with Police Officers under stressful conditions, maintaining order and promoting safety. Further, the appointing authority acknowledges that it offered the appellant a conditional offer of employment when it sent him for psychological testing, but argues that candidates were advised at the time of the conditional offer that they needed to complete all phases of pre-employment processing in order to be hired. It relies on *Johnson v. Public Services Enterprise Group*, 529 Fed.Appx. 188 (C.A. 3 (N.J.), 2013) and *Enigwe v. U.S. Airways/U.S. Airways Express*, 438 Fed.Appx. 80 (C.A. 3 (P.A.), 2011) in arguing that courts have found it permissible to withdraw a conditional offer of employment based on background investigations.

CONCLUSION

N.J.S.A. 11A:4-11 and *N.J.A.C.* 4A:4-4.7(a)4 provide that an eligible's name may be removed from an eligible list when an eligible has a criminal record that includes a conviction for a crime that adversely relates to the employment sought. The following factors may be considered in such determination:

- a. Nature and seriousness of the crime;
- b. Circumstances under which the crime occurred;
- c. Date of the crime and age of the eligible when the crime was committed;
- d. Whether the crime was an isolated event; and
- e. Evidence of rehabilitation.

Additionally, pursuant to *N.J.S.A.* 11A:4-10, an appointing authority may only question an eligible for a law enforcement, firefighter or correction officer title as to any arrest. It is noted that the Appellate Division of the Superior Court remanded the matter of a candidate's removal from a Police Officer eligible list to consider whether the candidate's arrest adversely related to the employment sought based on the criteria enumerated in *N.J.S.A.* 11A:4-11. See *Tharpe v. City of Newark Police Department*, 261 *N.J. Super.* 401 (App. Div. 1992).

Participation in a PTI program is neither a conviction nor an acquittal. See *N.J.S.A.* 2C:43-13(d). See also *Grill and Walsh v. City of Newark Police Department*, Docket No. A-6224-98T3 (App. Div. January 30, 2001); *In the Matter of Christopher J. Ritoch* (MSB, decided July 27, 1993). *N.J.S.A.* 2C:43-13(d) provides that upon completion of supervisory treatment, and with the consent of the prosecutor, the complaint, indictment or accusation against the participant may be dismissed with prejudice. In *Grill, supra*, the Appellate Division indicated that PTI provides a channel to resolve a criminal charge without the risk of conviction; however, it has not been construed to constitute a favorable termination.

Further, it is noted that the Merit System Board (Board) (the predecessor to the Civil Service Commission) has upheld the removal of eligibles from Fire Fighter lists on the basis of adverse criminal records. See *In the Matter of James Alessio* (MSB, decided March 9, 1999). In that case, the Board concluded that disregard for the law is unacceptable in a Fire Fighter who operates in the context of a paramilitary organization in which the ability to follow orders is crucial to saving lives. The Board relied on *Karins v. City of Atlantic City*, 152 *N.J.* 532, 552 (1998), in which the Supreme Court stated:

Firefighters are not only entrusted with the duty to fight fire; they must also be able to work with the general public and other municipal employees, especially police officers, because the police department responds to every emergency fire call. Any conduct jeopardizing an excellent working relationship places at risk the citizens of the municipality as well as the men and women of those departments who place their lives on the line on a daily basis. An almost symbiotic relationship exists between the fire and police departments at a fire.

N.J.A.C. 4A:4-4.7(a)1, in conjunction with *N.J.A.C.* 4A:4-6.1(a)9, allows the Commission to remove an eligible's name from an eligible list for other sufficient reasons. Removal for other sufficient reasons includes, but is not limited to, a consideration that based on a candidate's background and recognizing the nature of the position at issue, a person should not be eligible for appointment. *N.J.A.C.* 4A:4-6.3(b), in conjunction with *N.J.A.C.* 4A:4-4.7(d), provides that the appellant has the burden of proof to show by a preponderance of the evidence that an appointing authority's decision to remove his name from an eligible list was in error.

Initially, the appellant requests a hearing on this matter. List removal appeals are treated as reviews of the written record. *See N.J.S.A. 11A:2-6(b)*. Hearings are granted only in those limited instances where the Civil Service Commission (Commission) determines that a material and controlling dispute of fact exists which can only be resolved through a hearing. *See N.J.A.C. 4A:2 1.1(d)*. For the reasons discussed below, no material issue of disputed fact has been presented which would require a hearing. *See Belleville v. Department of Civil Service*, 155 N.J. Super. 517 (App. Div. 1978).

In the instant matter, the appellant's name was removed from the subject eligible list based on his arrest on charges of possession of a CDS and marijuana in 2012, which resulted in PTI; and his arrest in 2019 on charges of obstruction of the administration of law. Additionally, while the appellant disputes the account of the arresting officer that the appellant defied orders to quiet down and to move away from the scene, and that he yelled in an officer's face, the fact remains that the appellant was not found completely devoid of guilt in this matter as he entered into a plea agreement and was issued a fine. This incident, which occurred three months prior to the promulgation of the subject eligible list, when viewed together with his 2012 arrest, indicates that the appellant's criminal history adversely reflects on his character and his suitability for the position at issue. His current background demonstrates qualities that are unacceptable for an individual seeking a position as a municipal Fire Fighter. Accordingly, the appellant's unsatisfactory criminal record constitutes sufficient cause to remove his name from the eligible list for Fire Fighter (M1866W), City of Plainfield.

Further, the appellant has argued that that the appointing authority subjected him to a psychological examination. Pursuant to the Americans with Disabilities Act (ADA), 42 U.S.C.A. sec. 12112(d)(3), no medical or psychological examination may be conducted prior to rendering a conditional offer of employment. *See also*, the Equal Employment Opportunity Commission's *ADA Enforcement Guidelines: Preemployment Disability Related Questions and Medical Examinations* (October 10, 1995). Those guidelines state, in pertinent part, that in order for a conditional offer of employment to be "real," the employer is presumed to have evaluated all information that is known or should have reasonably been known prior to rendering the conditional offer of employment. This requirement is intended to ensure that the candidate's possible hidden disability or prior history of disability is not considered before the employer examines all of the relevant non-medical information.

In this case, the appointing authority did not strictly conform with the requirements of the ADA. By choosing to conduct the appellant's background check after scheduling and completing the appellant's psychological examination, the appointing authority did not have the opportunity to fully review the appellant's background before conducting the psychological examination. Consequently, the

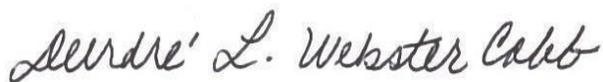
appointing authority did not comply with the requirement of rendering a conditional offer of employment, based upon a complete review of the candidate's background, prior to administering the psychological examination. Further, while the appointing authority relied on two cases in arguing that it could revoke a conditional offer of employment, neither of those case involved the ADA and a psychological examination. While the appointing authority would be well served to revise its candidate evaluation procedures to avoid having this issue raised in future cases, based upon the totality of the circumstances presented in this matter, it appears that the appellant's unsatisfactory background constitutes sufficient cause to remove her name from the eligible list for Fire Fighter (M1866W), City of Plainfield. *See In the Matter of Curtis L. Dorch* (MSB, decided September 25, 2002).

ORDER

Therefore, it is ordered that the appellant's appeal be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 30TH DAY OF JUNE, 2021



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